In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 943

WILLIAM MARKS, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A3) is at 368 F. 2d 566.

JURISDICTION

The judgment of the court of appeals (Pet. App. A4–A5) was entered on November 9, 1966. On December 7, 1965, Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari to and including January 7, 1967. The petition was filed on January 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conviction may rest upon the uncorroborated testimony of accomplices.

2. Whether the trial court improperly restricted cross-examination of government witnesses.

3. Whether the conviction is subject to reversal for inconsistency in the verdict.

STATEMENT

Petitioner, a certified public accountant and member of the New York bar, was convicted after trial by jury in the United States District Court for the Southern District of New York of two counts charging the bribery of Internal Revenue Service auditors in violation of 18 U.S.C. (1958 ed.) 201 and two counts charging the aiding and abetting of the auditors in receiving unlawful fees in violation of 26 U.S.C. 7214(a)(2). He was acquitted of three counts charging the bribery of Internal Revenue Service auditors in violation of 18 U.S.C. (1964 ed.) 201(b) and three counts charging the giving of money to said auditors because of official acts performed by them in violation of 18 U.S.C. (1964 ed.) 201(f). He was given a one year and one day suspended sentence on each of the four counts upon which he was convicted and placed upon probation for one year, conditioned upon his resignation from the bar and as a certified public accountant and his surrender of his United States Treasury card. The special conditions have been stayed pending appeal (R. 289a).

The government's case consisted of the testimony of four former auditors of the Internal Revenue Service, who testified that petitioner paid them sums ranging from $50 to $200 in return for favorable audits of the tax returns of his clients. It was their testimony that petitioner made the approaches to them, asked

them to assign themselves to his cases, and asked them to suggest other auditors who might also be amenable to similar arrangements. The witnesses admitted that they had either been discharged or had resigned under fire; that (with one exception) they had already pleaded guilty to one or more indictments charging them with receiving bribes or unlawful fees and were awaiting sentence; that they had been and intended to be government witnesses in other bribery cases; and that they hoped by testifying to avoid jail sentences (or, in the case of the unindicted witness, to avoid indictment) (R. 22a–140a *passim*). Petitioner unsuccessfully sought to question two of the witnesses, for impeachment purposes, concerning other bribes which they had accepted for which they had not been indicted (R. 36a–39a, 123a–126a).

Petitioner, testifying in his own defense, denied that he had offered or paid any bribes, contending that he had supported all of his clients' deductions at the audits with proper substantiation (R. 158a–215a *passim*). His father also took the stand to deny having met one of the government witnesses in connection with one of the two transactions upon which the jury convicted (R. 152a–153a), thereby contradicting the witness's testimony on that point (R. 71a).

The trial court instructed the jury that, since the government's witnesses were accomplices, their testimony was to be scrutinized with special care and acted upon with caution, but that nevertheless corroboration was not required (R. 248a). Petitioner noted an exception on this point (R. 263a). The jury, after deliberating for two days and informing the

court three times that it was hopelessly deadlocked (R. 266a, 268a, 279a), convicted on four counts and acquitted on six (R. 283a).[1]

ARGUMENT

1. Ever since *Caminetti* v. *United States,* 242 U.S. 470, 495, it has been accepted in federal practice that accomplice testimony is sufficient, without corroboration, to support a conviction. The most that has ever been required is a cautionary instruction of the type given here by the trial court. See *Williams* v. *United States,* 308 F. 2d 664, 666 (C.A. 9); *Bishop* v. *United States,* 243 F. 2d 32, 33 (C.A. D.C.); *Williamson* v. *United States,* 332 F. 2d 123, 132 (C.A. 5); *United States* v. *Agueci,* 310 F. 2d 817, 833 (C.A. 2), certiorari denied, 372 U.S. 959; *United States* v. *Kelly,* 349 F. 2d 720, 767 (C.A. 2), certiorari denied, 384 U.S. 947. It is particularly appropriate not to require corroboration in a bribery case such as this one, where physical evidence is unlikely and only the two parties to the transaction are likely to have any direct knowledge concerning it. Compare *United States* v. *Agueci, supra,* 310 F. 2d at 833.

2. It is familiar law that a witness may be impeached by proof of prior convictions but not by proof of criminal conduct which did not result in a conviction (*Michelson* v. *United States,* 335 U.S. 469, 482), and that the permissible limits of cross-examination are committed to the discretion of the trial court (*Glasser* v. *United*

[1] Deliberations were continued, after the last two occasions upon which the jury announced itself deadlocked, at the request of petitioner (R. 268a–270a, 279a–280a).

States, 315 U.S. 60, 83). Here the motivation of each accomplice witness to testify in the hope of avoiding either a jail sentence or an indictment was amply demonstrated to the jury. The further questions concerning the receipt of other bribes which petitioner sought to ask of two of the witnesses were therefore cumulative, and the trial court was well within its discretion in refusing to permit them.

3. Petitioner was charged with five separate instances of bribery, involving four different Revenue Service auditors. Hence, as a matter of law, there was no inconsistency in the jury's finding him guilty in respect to two of the instances and acquitting him in respect to the other three. *Dunn* v. *United States,* 284 U.S. 390, 393. In any event, juries are not required to be consistent in their verdicts. *Dunn* v. *United States, supra; United States* v. *Dotterweich,* 320 U.S. 277, 279.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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